

BEFORE THE  
**Federal Communications Commission**  
 WASHINGTON, DC 20554

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In the Matter of )  
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 Implementation of the )  
 Telecommunications Act of 1996: )  
 )  
 Telecommunications Carriers' Use )  
 of Customer Proprietary Network )  
 Information and Other Customer Information )

CC Docket No. 96-115

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**COMMENTS OF PRIMECO PERSONAL COMMUNICATIONS, L.P.**

PrimeCo Personal Communications, L.P. ("PrimeCo") hereby submits these comments in support of the petition by the Cellular Telecommunications Industry Association ("CTIA") seeking temporary deferral of the effective date of the application of Rules 64.2005(b)(1) and (b)(3) to commercial mobile radio services ("CMRS") providers.<sup>1</sup> PrimeCo agrees with CTIA that application of these rules to CMRS providers will impede competition in the CMRS market and interfere with the ability of customers to obtain new wireless services and features.

Postponing the effective date of these rules will serve the public interest by maintaining the *status quo ante* while the Commission examines the unintended, undesirable, and heretofore unconsidered, consequences of these new customer proprietary network information ("CPNI") rules as applied to CMRS providers. Further, delay in implementation of these rules will result in no harm to any party. Therefore, PrimeCo urges the Commission to grant the CTIA petition by deferring the effective date of Rules 64.2005(b)(1) and (b)(3), to the extent they

<sup>1</sup> See "Pleading Cycle Established for Comments on Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information Request for Deferral and Clarification," *Public Notice*, DA 98-636 (May 1, 1998).

apply to CMRS providers, pending further consideration of its recent order governing the use of CPNI.<sup>2</sup> PrimeCo also asks that the Commission act on this request before May 26, 1998, the date the rules are set to take effect.

## I. BACKGROUND

Traditionally, CMRS providers have used CMRS CPNI to market CMRS-related customer premises equipment (“CPE”) and information services.<sup>3</sup> The Commission has long recognized and promoted the public benefits associated with these product marketing programs.<sup>4</sup> “These benefits allow customers to obtain a wide assortment of combined CPE and service from numerous sources, including the carriers and their agents.”<sup>5</sup>

Similarly, customer retention and win-back programs are also important pro-competitive practices in the CMRS industry. Attracting and signing-up new customers requires a substantial capital investment by carriers, including costs associated with advertising, sales commissions, and operating retail outlets. This investment creates significant incentives for carriers to retain or win-back customers, particularly given the ease with which customers may

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<sup>2</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Information and Other Customer Information*, CC Docket No. 96-115, *Second Report and Order*, FCC 98-27 (rel. Feb. 26, 1998) (“CPNI Order”). While no petitions for reconsideration of the *CPNI Order* have yet been filed, it is PrimeCo’s understanding that entities intend to seek reconsideration of the Commission’s decision to apply Rules 64.2005(b)(1) and (b)(3) to CMRS providers. PrimeCo notes, further, that GTE Service Corporation has filed a Petition for Forbearance relating to these two rules.

<sup>3</sup> *See CPNI Order* at ¶¶ 47, 77.

<sup>4</sup> *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992).

<sup>5</sup> *Id.* at 4032.

switch carriers. These retention and win-back efforts are competition at its best and inure directly to the benefit of customers.

There is no indication in the language or legislative history of Section 222 of the Communications Act to suggest that Congress intended to dismantle these important CMRS marketing programs. As the Commission recognizes, Section 222 was intended to balance the public benefits of competition with customer privacy protections.<sup>6</sup> To that end, Section 222(c)(1) provides:

[A] telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in its provision of (a) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.<sup>7</sup>

The Commission, however, has implemented this provision in a way which renders unlawful long standing CMRS marketing programs, without regard to the language of the statute or Congressional intent on this matter. Specifically, new Rule 64.2005(b)(1) restricts CMRS providers' ability to use CPNI to market wireless CPE and information services to their customers.<sup>8</sup> Remarkably, the Commission adopted this rule despite the fact that CPE (*i.e.*, CMRS handsets), has been recognized to be necessarily interrelated with CMRS (for both technical and marketing purposes), and that voice mail and other information services are viewed

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<sup>6</sup> CPNI Order at ¶ 3.

<sup>7</sup> 47 U.S.C. § 222(c)(1).

<sup>8</sup> In adopting Rule 64.2005(b)(1), the Commission recognized three categories of service — CMRS, local exchange, and interexchange — and limited the use of CPNI to the types of service to which the customer had subscribed. However, the Commission then went on to conclude that CMRS does *not* include CPE or information services.

as critical by many consumers for their mobility needs. New Rule 64.2005(b)(3) has negative competitive consequences in that it arguably prevents a CMRS carrier from using or accessing CPNI to retain as well as win back a former customer.

PrimeCo does not concur with the Commission's decision to apply these new CPNI restrictions to CMRS providers. Further, PrimeCo understands that CMRS carriers and other entities will likely petition for reconsideration and/or clarification as necessary to obtain relief from the *CPNI Order*. Moreover, GTE Service Corporation has already petitioned the Commission for forbearance from application of Rules 64.2005(b)(1) and (b)(3) to CMRS providers. Thus, the Commission will shortly have the opportunity to rethink whether application of the two rules to CMRS providers is appropriate and lawful. Nevertheless, such petitions do not stay the effectiveness of these rules as interpreted by the *CPNI Order*. Thus, a delay in the effective date is necessary.

As CTIA demonstrated in its Petition and as discussed below, application of these rules to CMRS providers will have immediate and significant adverse consequences. PrimeCo does not believe these results were intended, or even foreseen, by the Commission. PrimeCo submits therefore that the facts warrant Commission action to defer effectiveness of these new rules pending resolution of petitions for reconsideration or forbearance.

## **II. THE COMMISSION SHOULD DEFER EFFECTIVENESS OF RULES 64.2005(B)(1) AND (B)(3) PENDING FURTHER CONSIDERATION OF ITS *CPNI ORDER***

The Commission has broad discretion to set the effectiveness dates of new regulations.<sup>9</sup> Section 1.103 of the Commissions Rules states expressly that the Commission may

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<sup>9</sup> See 5 U.S.C. § 554(d).

“designate an effective date that is . . . later in time than the date of public notice of such action.”<sup>10</sup> The Commission has previously exercised this authority to defer the effectiveness of a rule where it became aware of unanticipated and unintended consequences of the rule after adopting such rule.<sup>11</sup> Deferral was deemed appropriate in these cases to permit the Commission to develop a record and undertake a further analysis in light of the unanticipated concerns. Similarly, deferral of the effective date of Rules 64.2005(b)(1) and (b)(3) as applied to CMRS providers is appropriate here.<sup>12</sup>

As noted above, and as detailed in the CTIA Petition, the new CPNI rules raise issues unique to CMRS. It is well settled that CMRS is fundamentally different from landline services and these differences can necessitate differences in the application of CPNI rules. In fact, the Commission’ adoption of the “total service approach” under Section 222(c)(1)(A) turned, in part, on the uniqueness of CMRS.<sup>13</sup>

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<sup>10</sup> 47 C.F.R. § 1.103(a). The Commission adopted this rule to make clear that it has “broad discretion to designate the effective date of its actions.” *Addition of New Section 1.103 to the Commission’s Rules of Practice and Procedure*, 85 F.C.C. 2d 618, 620 ¶ 8 (1981).

<sup>11</sup> *See, e.g., CMRS Rate Integration Deferral Order*, 12 FCC Rcd 15739 (1997); *Policies and Rules Concerning Unauthorized Changes of Consumer’s Long Distance Carriers*, 11 FCC Rcd 856 (1995); *Amendment of Part 22 of the Commission’s Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, 8 FCC Rcd 8135 (1993).

<sup>12</sup> PrimeCo notes that, as an exercise of discretionary authority, deferral of the effective date of a rule may not require satisfaction of the four-part test for granting stay set forth in *Virginia Petroleum Jobbers Ass’n v. FPC* and applied by the Commission. *See Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Communique Telecommunications, Inc.*, 10 FCC Rcd 10399, 10406 (1995). Nevertheless, PrimeCo believes that CTIA’s Petition as well as GTE’s Petition meet the *Virginia Petroleum Jobbers* standard.

<sup>13</sup> *CPNI Order* ¶ 40.

Perversely, and despite this recognition, the Commission ignored the unique nature of the CMRS market, and the technical differences in service, in considering application of Rules 64.2005(b)(1) and 64.2005(b)(3). The Commission instead relied on legal classifications developed for landline carriers (*e.g.*, “basic,” “adjunct to basic,” CPE, and information services). In effect, the Commission extended landline concepts to a unique and fundamentally different service without recognizing that these concepts had never before been applied to CMRS and have no relevance to the competitive mobility market which CMRS providers serve.

The Commission’s failure to account for the unique nature of the CMRS market is not merely academic; it will have immediate and disruptive impacts on CMRS customers and the CMRS industry as a whole. For example, and as discussed in the CTIA filing, the wireless handset is technologically inseparable from transmission service and must be programmed with subscriber data as part of the activation process. Thus, carriers sell phones *and* the programming/services necessary for mobile service in tandem.<sup>14</sup> CMRS providers have long used CPNI to identify customers likely to be interested in specific new features and packages — including packages containing handsets and information services.<sup>15</sup> As CTIA suggests, CMRS customers expect that their carriers will advise them of new services and equipment appropriate to their needs and usage. The new CPNI rules will prohibit carriers from using CPNI to further this efficient and proactive means of providing new services and products to customers. Such a result clearly is not in the public interest and *no* competitive or privacy concerns are affected by the current practice.

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<sup>14</sup> CTIA Petition at 16.

<sup>15</sup> *See, e.g., CPNI Order* at 36 ¶47 and 61 ¶ 77.

PrimeCo does not believe these results were intended, or even foreseen, by the Commission. Indeed, Rules 64.2005(b)(1) and (b)(3) were imposed upon CMRS carriers almost in passing. The Commission's brief discussion of Section 222(c)(1) gave scant attention to CMRS and the unique competitive market the service fills, and the different technology employed. In short, these new rules were imposed upon CMRS carriers without a record or substantive discussion of the repercussions of such action.

PrimeCo therefore respectfully requests the Commission to defer immediately the effectiveness of Rules 64.2005(b)(1) and (b)(3) as they apply to CMRS carriers, pending resolution of petitions for reconsideration or clarification. Deferring effectiveness of these rules will maintain the *status quo ante* and provide the Commission an opportunity to develop a record and analyze the different, complex issues related to application of the rules to the CMRS industry. A temporary stay of enforcement would also be consistent with prior Commission precedent cited above.

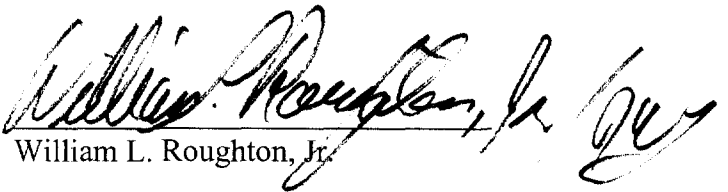
## **CONCLUSION**

For the foregoing reasons, PrimeCo respectfully requests that the Commission defer the effective date of Rules 64.2005(b)(1) and (b)(3) to the extent they apply to CMRS

providers. Further, PrimeCo requests that the Commission grant such a deferral before May 26, 1998, the date these two rules are currently scheduled to take effect.

Respectfully submitted,

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May 8, 1998

## **CERTIFICATE OF SERVICE**

I, Shelia L. Smith, hereby certify that I have on this 8th day of May, 1998 caused a copy of the foregoing Comments to be served by first class U.S. mail, postage prepaid, to the following:

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